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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE SIXTH INSTALMENT OF INDIVIDUAL CLAIMS FOR DAMAGES ABOVE USD 100,000 (CATEGORY "D" CLAIMS)

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Introduction

1. At its thirtieth session held from 14-16 December 1998 the Governing Council of the United Nations Compensation Commission (the "Commission") appointed the "D2" Panel of Commissioners, comprising Messrs. Kamal Hossain (Chairman), Nabil Elaraby and Isomi Suzuki (the "Panel"). The Panel is one of two Panels appointed to review claims filed by individuals for amounts above USD 100,000 (category "D" claims).

2. This is the first report to the Governing Council of the "D2" Panel submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (the "Rules").

3. This report contains the determinations and recommendations of the Panel in respect of the sixth instalment of category "D" claims, comprising 172 claims for individual business losses filed on the D8 and D9 pages of the category "D" claim form ("D8/D9"). 1/ As part of its review of these 172 claims, the Panel developed a methodology for resolving D8/D9 business loss claims filed in category "D".

4. This report describes the D8/D9 business loss methodology developed by the Panel, and outlines the recommendations of the Panel with respect to the claims in the sixth instalment.

5. With the completion of the D8/D9 business loss methodology as outlined in this report, all category "D" methodologies are now complete and all future claims considered in category "D" will contain loss types for which methodologies are in place. Accordingly, all future instalments will contain only "application claims". The Panel notes that some of these application claims will inevitably include new legal or factual situations, and that the Panel will address these as they are encountered.

I. OVERVIEW OF THE SIXTH INSTALMENT CLAIMS

A. Selection of the claims

6. The sixth instalment claims were selected from a population of approximately 11,000 category "D" claims with a view to presenting a broad range of business loss issues, as well as a group of claims that was representative of the size and diversity of the claims presented in category "D".

7. A selection of claims (the "Pilot Group") was used to enable the Panel, by its resolution of these claims, to establish a comprehensive methodology

that can be consistently applied in resolving D8/D9 individual business loss claims.

8. The selection of the Pilot Group was initially limited to those claimants advancing D8/D9 individual business losses only. In order to ensure that claims advancing only D8/D9 losses were representative of the issues encountered in claims with both D8/D9 and other category "D" loss types, a review of claims containing D8/D9 individual business losses as well as other category "D" losses was undertaken. The review confirmed that claims with multiple loss types presented no unique issues.

9. A sample of 300 claims with D8/D9 losses only was then generated to reflect the approximate percentage of claims from each of the submitting entities. An attempt was made to include claims from as many submitting entities as possible, even where the total number of claims submitted by certain entities was relatively few, in order to ensure that the broadest range of issues was present in the Pilot Group. In all, 19 submitting entities (18 governments and one international organisation) are represented in the Pilot Group.

10. The sample of 300 claims was reviewed, and 200 of the claims were selected for the Pilot Group based upon the types of business losses asserted and the issues raised in each.

11. When the Pilot Group of 200 claims was matched against other claims in the category "D" population, duplicate claims and claims by related parties such as business partners were transferred into the Pilot Group, bringing the number of claims in the sixth instalment up to 206.

12. One sixth instalment claim was determined to be inappropriately filed in category "D" and has been transferred from the instalment to the "E2" group of claims. 2/ Another sixth instalment claim was withdrawn by its submitting entity during the course of the instalment pursuant to article 42 of the Rules. Two claims were deferred pending the receipt of further information on the ownership of a number of related businesses, and one further claim was deferred to the 12th instalment of category "D" claims to be processed with its related claim.

13. A total of 30 claims in the sixth instalment were identified as being, in whole or in part, claims by shareholders in Kuwaiti "W.L.L." (with limited liability) entities. These claims were deferred from the sixth instalment by the Panel pending the receipt of guidance from the Governing Council. The deferral of these shareholder claims results in a final total of 172 claims in the sixth instalment. 3/ A more detailed

discussion of the deferral of these shareholder claims appears under Part V. Cross Category Issues, below.

B. Characteristics of the instalment

14. The 172 sixth instalment claims allege losses aggregating USD 146,932,806.00 in one or more of the loss elements contained in the D8/D9 methodology described below. The business losses claimed range in amount from USD 17,435 to USD 34 million. 4/

15. Most of the claimants in the sixth instalment operated a business in Kuwait prior to Iraq's invasion and occupation. There are, however, a number of claimants in the sixth instalment whose businesses operated primarily outside of Kuwait, who claim losses resulting from Iraq's invasion and occupation of Kuwait. Most of the businesses traded in consumer items such as jewellery, vehicles, textiles and foodstuffs. A significant number of claimants were engaged in the service industry, providing services in areas such as construction and engineering, legal, financial, medical, transportation, travel and travel-related services. Apart from these trading and service related businesses, several claimants were engaged in agriculture or agriculture related operations and a number were involved in the manufacture of textiles and other goods.

16. The D9 page of the claim form allows the classification of business losses into losses related to real property, business vehicles, tangible business property, business bank accounts and securities, loss of business income, income producing entity and other losses. Claimants in this instalment have sought compensation under all of these loss types. The most commonly claimed loss types are loss of business income and loss of tangible property (mainly furniture, fixtures, equipment and stock). In terms of aggregate value, the largest amounts claimed are also for loss of tangible property and loss of business income.

17. Sixth instalment claimants also submitted claims for uncollected receivables, goodwill, key money, contracts and other losses not specifically itemised on the D9 page of the claim form. In order to organise the variety of loss types encountered and to develop consistent review programmes for each, a second level of "loss elements" was created. Depending on the nature of the loss, each loss type claimed is reclassified into one of the following loss elements: real property repairs, real property rental income, tangible property, stock, livestock and agricultural products, cash, invalid Kuwaiti dinar, bank accounts in Iraq, bank accounts in Kuwait, vehicles, loss of business income, contracts, receivables, rent-a-permit, goodwill, key money and incremental costs.

18. The following table sets out the number of claims and total claim amounts by submitting entity in the sixth instalment. The amounts claimed are gross figures including any claims for interest and claim preparation costs.

Table 1. Summary of claimed amounts by submitting entity

Submitting entity	Number of claims	Amount claimed (USD)
Australia	1	203,416.00
Bahrain	4	1,725,535.00
Belgium	2	1,122,554.00
Canada	3	1,699,792.00
Cyprus	1	203,160.00
France	2	1,293,766.00
India	1	32,872.00
Israel	1	154,000.00
Jordan	34	23,392,715.00
Kuwait	98	46,131,770.00
Netherlands (the)	3	36,252,341.00
Pakistan	3	696,508.00
Saudi Arabia	2	7,250,821.00
Sudan	1	17,436.00
Syria	3	3,746,252.00
United Kingdom	4	9,021,666.00
United States	3	11,463,904.00
Yemen	5	2,210,513.00
UNDP (Washington)	1	313,785.00
Total	172	146,932,806.00

II. THE PROCEEDINGS

19. The Panel began its review of the sixth instalment on 22 July 1999. The Panel met regularly at the Commission's headquarters in Geneva to consider the claims in the sixth instalment.

20. In view of the complex legal and valuation issues arising from the development of the business loss methodology for category "D" claims, the Panel designated the sixth instalment claims "unusually large or complex" pursuant to article 38(d) of the Rules. Accordingly, in Procedural Order No. 1 dated 22 July 1999, the Panel gave notice of its intention to complete its review of the sixth instalment claims and submit its report and recommendations to the Governing Council within 360 days.

21. On the instruction of the Panel, technical missions composed of members of the secretariat and expert consultants visited Kuwait (twice) and Jordan (once) to conduct extensive interviews with claimants, Government officials, and private sector experts such as accountants and lawyers. These interviews provided the Panel with valuable information on business conditions in Kuwait before and after Iraq's invasion and occupation of that country.

22. By Procedural Order No. 2 issued on 17 September 1999, the Panel instructed the secretariat to transmit to Iraq copies of the claim files for relevant claims in the sixth instalment, including those claims of a certain magnitude and claims involving an Iraqi party or a transaction with an Iraqi entity. In total, 10 claim files were forwarded to Iraq, and Iraq was invited to submit a written response to each as well as to produce any evidence that might be relevant thereto. Iraq provided written responses with respect to all of these claims, along with a request for oral proceedings. The Panel has taken Iraq's responses into consideration in its work.

23. At the request of the Panel, the secretariat advised Iraq in May 2000 that due to the nature of the sixth instalment claims, it was not considered necessary to hold oral proceedings in respect of those claims. Iraq was, however, invited to submit any further arguments or information to the Panel in written form.

24. The Panel wishes to emphasise the importance of Iraq's participation in its work, and the attention that the Panel has provided to Iraq's responses to the claims in the sixth instalment.

25. The Panel has taken into consideration relevant information and views presented by a number of governments that have submitted claims, and by the Government of Iraq, in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules. This includes information and views received in response to article 16 reports made with respect to business loss issues that have arisen in category "E".

26. The D8/D9 business loss methodology covers every business sector suffering losses as a result of Iraq's invasion and occupation of Kuwait. It is intended that the category "D" business loss methodology apply to thousands of individual business loss claims with amounts ranging from thousands to millions of United States dollars. The development of such a methodology has been a complex task. As such, the Panel retained expert consultants in the areas of accounting and loss adjusting to provide advice on valuation matters, pursuant to article 36 of the Rules.

27. The Panel has also relied extensively on the work of the "D1" Panel in investigating conditions in Kuwait and the situation of Kuwaiti and non-Kuwaiti claimants in category "D", as outlined by the "D1" Panel in its reports to the Governing Council.

28. In addition, the Panel seeks to be consistent in so far as is possible with the verification and valuation procedures adopted for other category "D" and "E" losses. This is achieved by adopting the relevant features of these related methodologies in the assessment of D8/D9 claims, where appropriate.

III. LEGAL FRAMEWORK

A. Applicable law

29. Pursuant to resolution 687 (1991), the Security Council established Iraq's liability under international law for any direct loss arising as a result of Iraq's unlawful invasion and occupation of Kuwait. 5/ Resolution 687 (1991) states (in part) that Iraq:

> "... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

30. Article 31 of the Rules identifies the law to be applied by panels of Commissioners in their consideration of claims. Specifically, panels are to apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decision of the Governing Council. Where necessary, panels are to apply other relevant rules of international law.

31. In its decision 9, the Governing Council provided guidance to the panels of Commissioners with respect to the valuation of compensable business losses. 6/ Specific guidance was provided with respect to contracts, tangible property and losses relating to income producing properties. The principles outlined in decision 9 form the basis of the business loss methodology developed by the Panel.

B. Evidentiary requirements

32. Article 35(1) of the Rules provides that:

> "Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted."

33. Article 35(3) provides that claims in categories "D", "E" and "F" must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.

34. In addition, in decision 15 the Governing Council expressly states in relation to "all types of business losses, including losses relating to contracts, transactions that have been part of a business practice or course of dealing, tangible assets and income producing properties", that "[t]here will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury." 7/

35. The D9 page of the category "D" claim form instructed individual business loss claimants to:

> "- Attach a statement describing what happened (e.g., prevention of access, removal of property, looting or destruction) and the steps you took to reduce your loss or damages.
> - Attach a separate list describing each element of loss (such as damage to business property, loss of bank accounts and cash, damage to intangible assets, lost income, losses on uncompleted contracts).
> - Attach documentary and other appropriate evidence that supports your calculated value of loss. Include a statement describing your method of valuation."

36. In summary, for each individual business loss claim, the evidentiary requirements include a detailed factual description of the circumstances of the loss, a description of the method of valuation, together with documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.

C. Causation

37. Resolution 687 (1991) of the Security Council provides for Iraq's liability for any "direct" loss arising as a result of its invasion and occupation of Kuwait. The Panel has been particularly concerned to ensure that all losses recommended for compensation are direct losses caused by Iraq's invasion and occupation of Kuwait.

38. In dealing with the issue of causation, the Panel has been guided by Governing Council decision 7, which provides that compensation is available with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period; or

(e) Hostage-taking or other illegal detention. 8/

39. In decision 15, the Governing Council confirmed that these guidelines are not intended to be exhaustive. 9/

40. Where losses were caused in whole or in part by the trade embargo and related measures, the Panel has also proceeded with reference to decision 15 of the Governing Council. 10/ Specifically, losses caused solely by the trade embargo and related measures are not compensable. On the other hand, losses that are attributable directly to Iraq's invasion and occupation of Kuwait are compensable in principle, even if those same losses are also attributable to the embargo and related measures taken against Iraq.

41. In summary, the causation analysis for each claim begins with reference to resolution 687 (1991) of the Security Council, and an assessment of whether the claimed loss is a direct loss resulting from Iraq's invasion and occupation of Kuwait. The Panel has interpreted

resolution 687 (1991) in accordance with the guidance provided by the Governing Council in decision 7 (and decision 15 for embargo related losses). In each case, the Panel assesses whether the causation test has been met based on one of the causal relationships outlined in paragraph 6 of decision 7, or some other causal relationship arising directly from Iraq's invasion and occupation of Kuwait. If a claim or a loss element in a claim fails to meet this causation test, the Panel recommends no compensation for that claim or loss element.

42. As an example of the application of these causation principles, the Panel has recommended compensation for numerous claims in the sixth instalment where the loss suffered was an inventory of goods looted during the period of Kuwait's occupation. The Panel considers such losses to be compensable whether the looting was undertaken by Iraqi soldiers or agents, or by others as a result of the breakdown of civil order in Kuwait. In contrast, several losses arising in the period following Kuwait's liberation have not been recommended for compensation on the basis that the claimants have failed to establish that they were direct losses arising from Iraq's invasion and occupation of Kuwait.

D. The role of the Panel

43. Three tasks have been entrusted to the Panel by the Governing Council. First, the Panel must determine whether an alleged loss falls within the jurisdiction of the Commission and is compensable in principle. Second, the Panel must verify whether the loss was actually suffered by the claimant. Third, the Panel must determine the amount of any compensable loss suffered by the claimant and recommend an award in respect thereof.

44. Taking into account the evidentiary and causation requirements that must be met by individual business claimants in category "D", and considering the legal principles that must be respected in the valuation of compensable individual business losses, a case by case assessment of each claim is required.

45. The Panel anticipates that the individual business loss methodology will, in future instalments, be applied to as many as 650 claims during a formal review period of six months. As such, each claim will be individually reviewed by the secretariat to identify legal and valuation issues for the consideration of the Panel. In addition, the Panel will review and test the application of the individual business loss methodology to claims in any given instalment.

46. In summary, the Panel's objective was to resolve the claims in the sixth instalment by establishing the principles for a consistent and objective methodology for individual business losses, based on a detailed review of a large number of claims under the close supervision of the Panel. The methodology described in this report is designed to meet these requirements.

IV. THE D8/D9 BUSINESS LOSS METHODOLOGY

A. Introduction

47. Once the Panel determines which losses asserted by the claimants are compensable in principle, the Panel proceeds to the verification and valuation of each of the loss elements claimed.

48. Four procedural steps are adopted in the verification and valuation of each loss element claimed: the preliminary adjustment procedure; the evaluation of evidence; the valuation of the asserted claim; and the determination of the recommended compensation.

49. Two aspects of the methodology, materiality and streaming, require elaboration prior to a discussion of the four procedural steps.

1. Materiality

50. In order to improve the efficiency of claims processing and to identify the areas with the greatest risk of overstatement, the Panel uses a "materiality" standard. The materiality level is defined as the level the Panel determines to be significant having regard to the amount claimed. Individual items and aggregate balances are deemed to be significant if they exceed the materiality level. All material items are processed through the four procedural steps outlined below.

51. Items that fall below the materiality level are deemed to be "non-material". If there is no evidence that contradicts the asserted claim, no further assessment of the non-material item is required and the asserted value becomes the recommended amount. Where there is evidence that contradicts the asserted value, the item is processed through the four procedural steps described below. An accumulation of non-material items can become a material amount in certain circumstances, which are set out in more detail in section 3(d), below.

2. Streaming

52. The Panel notes that the diversity of the claimants, the varied nature of their businesses and their differing pre and post-invasion circumstances necessitate a division of the claimants into different streams in order to ensure consistency and fairness within the claimant population.

53. The review of the Pilot Group reveals certain characteristics about the claims population. Firstly, the businesses that form the subject of the claims traded in a variety of forms of business association. Businesses often operated under a commercial licence that was rented from the licence holder, a common practice in Kuwait known as "Rent-a-Permit". In addition, most individual businesses were unincorporated partnerships or sole proprietorships with no requirement to maintain or file financial records for the business. This fact affects the ability of many of the claimants to provide proof of the value of their businesses.

54. Secondly, while the majority of the businesses were located in Kuwait or Iraq, approximately five per cent of the Pilot Group consists of claims by businesses located outside Iraq or Kuwait. These claims present different issues concerning the causes of loss and the ability to provide documentary evidence to support the loss. For the most part, these claimants have access to all relevant records to support their claims.

55. In addition, many of the non-Kuwaiti claimants did not return to Kuwait after liberation because of political or economic barriers. These barriers affected their ability to provide supporting evidence to supplement their claims. In many instances, these claimants have nothing more to support their claim than the documents that they were able to carry with them when they fled Kuwait. Many of these claimants have not resumed their businesses after the liberation, and because of these circumstances, will experience difficulty in obtaining further documentary evidence.

56. In order to address the varying circumstances of the claimants, in particular the quality and quantity of business records available to support individual claims, the Panel proposes three streams of claimants, as follows:

(a) Kuwaiti claimants who operated a business in Kuwait or Iraq before the invasion and who either returned to or never left Kuwait or Iraq (Stream 1);

(b) Non-Kuwaiti claimants, excluding nationals of OECD countries 11/, who operated a business in Kuwait or Iraq before the invasion but who did not return to Kuwait or Iraq (Stream 2);

(c) Claimants who operated their businesses principally outside Kuwait or Iraq (Stream 3).

57. The classification of a non-Kuwaiti claim into Stream 2 is intended to take into account the political or economic barriers to returning to Kuwait faced by these claimants. Some non-Kuwaiti claimants who did not return to Kuwait after liberation will not face such barriers. For this reason, the Panel has specifically excluded nationals of OECD countries from Stream 2.

58. The streaming of claimants is intended to recognise and address the different circumstances that affect a claimant's ability to prove a loss of business claim. The assessment of an individual's circumstances both before and after liberation results in placing the claim in one of the three streams. The Panel notes that Stream 1 claimants are largely individuals with claims comparable to the corporate claims filed in the "E4" group of claims (Kuwaiti corporate claims), while Stream 3 claimants are largely individuals with claims comparable to the corporate claims filed in the "E2" group of claims (non-Kuwaiti corporate claims). On the other hand, Stream 2 claimants are individuals with unique claim characteristics not directly comparable to another claims category.

59. In summary, the streams are designed to treat similarly situated claimants in a similar fashion and to allocate different values to certain types of evidence depending upon the obstacles faced by claimants in obtaining access to documentary evidence. The three streams described above are recognition of the great diversity of the category "D" business claims population.

60. Where a claimant falls outside the three defined streams, the Panel classifies the claim into the most appropriate stream based upon the individual circumstances of the claimant.

3. Procedural steps

(a) The preliminary adjustment procedure

61. The preliminary adjustment procedure ("PAP") is the first of the four procedural steps in the review of a claimed loss. The PAP verifies the stream into which the claimant fits, verifies whether the claimant has provided evidence of the existence of the business at the date of invasion,

determines the proper classification of loss types into loss elements and adjusts for any arithmetical errors or inappropriate exchange rates.

62. After verifying the appropriate stream for the claimant, the adjustment procedure confirms whether sufficient evidence has been provided to prove that the claimant was operating the business claimed for on 2 August 1990. The claimant may provide either conclusive or circumstantial evidence of the existence of the business.

63. Evidence is deemed either circumstantial or conclusive depending on the age and nature of the document. The closer in time the document is to Iraq's invasion date, the more likely it is to be deemed conclusive. Similarly, if the document is of an independent or third party nature, it is more likely to be deemed conclusive. If the document is generated by the claimant, or merely supports circumstances from which an alleged fact may reasonably be presumed, it is likely to be deemed circumstantial.

64. The evidentiary credit for conclusive evidence is higher than for circumstantial evidence to reflect its greater reliability. Failure to provide either circumstantial or conclusive evidence of the existence of the business results in the immediate failure of the claim.

65. It is also at this stage that each of the individual elements of the claim and its constituent parts are identified. The PAP classifies each loss type claimed on the D9 page of the claim form into one of following specific loss elements: real property repairs, real property rental income, tangible property, stock, livestock and agricultural products, cash, invalid Kuwaiti dinars, bank accounts in Iraq, bank accounts in Kuwait, vehicles, loss of business income, contracts, receivables, rent-a-permit, goodwill, key money and incremental costs.

66. The PAP seeks to identify the total asserted claim for each of these loss elements in a business claim and group together the homogenous items within the loss element. The specific review programme for each of the loss elements then adjusts the items classified thereunder in a consistent fashion.

67. The Panel will also amend the claim for any inaccuracies identified in arithmetic calculations or for inappropriate exchange rates. This adjustment will also include the elimination of any duplication of loss items contained in the claim.

(b) Evaluation of evidence

68. In determining the relevance, materiality and weight of the evidence submitted, the Panel is aware that deficiencies in evidence lead to difficulties in accurately quantifying claims.

69. Claims with evidentiary deficiencies that prevent the precise quantification of a loss introduce a risk that a claim is overstated; therefore claims should be assessed in accordance with an evaluation of the risk of overstatement. The expression "risk of overstatement" does not connote a deliberate overstatement by a claimant. Rather, the approach to the verification and valuation of claims balances the claimant's inability to always provide best evidence against the "risk of overstatement" introduced by deficiencies in evidence.

70. The evaluation of evidence seeks to assess the quality and quantity of evidence submitted in support of each element of the asserted claim. This evaluation is conducted for each loss element and its constituent items by attributing a fixed percentage score to certain categories of evidence. The provision of a piece of evidence from that evidentiary category will result in the awarding of the fixed percentage score. The scores will be accumulated to give an overall evidence score for the loss element.

71. Evidence may be provided for each loss element that supports one or more of three objectives: existence, ownership, and value. In order to receive the optimal evidentiary score, each type of evidence must be provided by the claimant. As with evidence of the existence of a business, evidence for a loss element may also be of a conclusive or circumstantial nature depending on whether it is of an independent or third party nature, or whether it merely supports circumstances from which an alleged fact may reasonably be presumed. Likewise, the evidentiary credit for conclusive evidence is higher than for circumstantial evidence to reflect its greater reliability.

72. Given the range of losses described in the claims population and the variety of evidence proposed to support these losses, the Panel does not seek to identify a definitive list of documents that will satisfy the evidentiary requirements. Rather, the evidence presented is considered in each case to determine the category of evidence to which it relates.

(c) Valuation assessment

73. The valuation assessment is intended to adjust the asserted value of a loss element for possible overstatement. The specific adjustments proposed will vary according to the nature of the loss being asserted. For example, a tangible property claim asserted on an historic cost basis is adjusted to reflect a reasonable level of depreciation; a claim for estimated repair costs is adjusted to reflect a standard maintenance cost.

74. The valuation assessment is designed to ensure that the values claimed are consistent with the nature and size of the business. The valuation approach also compares the asserted claims with the documentary evidence to adjust for any inconsistencies.

(d) Determination of recommended award

75. The recommended award in respect of a particular loss element is calculated by taking the adjusted value determined through the valuation assessment and multiplying it by the evidence score.

76. Once the review of all of the asserted loss elements is complete, a final review is undertaken to consider the following matters: whether the asserted claim is consistent with the nature of the business; whether the assertion of grossly inflated loss elements has resulted in the overstatement of the materiality level and therefore the overstatement of the final recommended award; and whether there is any duplication of loss elements.

77. Where the Panel concludes that the claim for a lost asset is inconsistent with the nature of the claimant's business and the claimant has failed to produce conclusive evidence of the existence and ownership of that asset, the Panel may recommend no compensation.

78. Where a large portion of the final recommended award consists of non-material items, the materiality level is reduced, and previously non-material items are reviewed in detail. This procedure is designed to ensure that inflated claim amounts do not take advantage of materiality levels to obtain unjustified awards.

79. Lastly, a check is made to ensure that no item has been duplicated in the valuation of the loss elements. Where such duplication is identified, the item is only valued once.

80. A description of the review programmes for each of the loss elements in the D8/D9 methodology follows.

B. Real property claims

81. Ten claimants in the sixth instalment asserted claims aggregating USD 3,065,734.00 for real property losses, defined as loss or damage occasioned to real property or fixtures thereto, repair work already completed to such property, the estimated cost of work not yet completed, or the loss of rental income derived from real property.

82. There was one claim in the sixth instalment that asserted loss of rental income from real property. The claim was by the owner of apartments located in Cyprus, which had been rented to a travel company for sub-lease to third parties. During the term of the lease, the travel company breached the agreement, stating that Iraq's invasion and occupation of Kuwait constituted force majeure. The claimant claimed for nine months of lost rental income.

83. The Panel finds that the loss was not compensable in the light of the determination in the second instalment report of the "E2" Panel (the "E2(2) Report") relating to tourism claims, 12/ which held that claimants claiming losses originating outside Iraq or Kuwait must show that the particular country in which the loss was suffered was the subject of a "credible and serious threat of military action by either side", within the meaning of paragraph 21 of decision 7, and that Cyprus was not such a country.

84. Consequently, the Panel defers any decision in respect of the valuation of lost rental income arising from real property until a compensable claim is before it for consideration.

85. The Panel was guided in its development of a method for valuing D8/D9 real property repair losses by the earlier work of the "D1" Panel in respect of D7(real property) losses. 13/ The principles of compensability and valuation established by the "D1" Panel have been adopted in the consideration of real property repair losses suffered by businesses, with minor variations. In particular, the method of determining the evidentiary score for D7 losses operates on a risk deduction basis, whereas the D8/D9 method is incremental. The incremental method of scoring evidence builds up from zero, which is the approach used for the valuation of all other individual business losses.

1. Compensability

86. Real property repair claimants, whether they are claiming for actual or estimated repair costs, are required to prove the existence and their ownership of a business on the date of Iraq's invasion and occupation of Kuwait, in addition to their ownership of the real property in question. In the Pilot Group this was typically proved through confirmation of ownership provided through the Public Authority for Assessment of Compensation for Damages Resulting from the Iraqi Aggression ("PAAC"), lease documents showing repair obligations, estimates or service contracts from contractors and receipts for repairs undertaken. These documents indicated the identity of the party paying for the repair, and the nature and scope of the repair or an estimate of the cost to repair. Other documents submitted by claimants included police reports, photographs of damaged premises, audited or unaudited accounts showing the book value of the real property or fixtures, insurance documents evidencing coverage for the premises, loss adjuster or civil engineer reports and witness statements.

87. Claimants must also prove that the damage to the real property was a direct result of Iraq's invasion and occupation of Kuwait. In the Pilot Group this was typically proved by witness statements, police reports, photographs showing the damage, the claimant's statement and other similar documents.

2. Valuation method

88. Where a claim for real property repairs, either actual or estimated, passes the legal test for compensability, the claim proceeds to valuation. Each real property repair claim is given an evidence score based on the type and quality of evidence provided. To prove the value of an actual real property repair loss and thereby build an evidence score, a claimant may provide invoices for repair work, a builder's estimate, receipts from the contractor, reports from loss adjusters or engineers, a witness statement regarding the loss and other similar documents.

89. To prove the value of an estimated real property repair loss and thereby build an evidence score, a claimant may provide a third party estimate or quotation prepared by a contractor or supplier, a builder's estimate, a report from a loss adjuster or engineer, a witness statement describing the nature and the scope of the loss and other similar documents.

90. Valuation for either estimated or actual repairs is based on whether the asserted loss represents repair, reconstruction or improvements costs. Historic cost information and benchmark data derived from the "D1" Panel's report on D7(real property) losses are used to characterise the loss. 14/ If a claimant has not clearly stated the basis of the valuation, the benchmark data is used to determine whether the repair cost is to be characterised as a repair, reconstruction or improvement cost. The value of the loss is then subject to appropriate adjustments for depreciation and betterment.

91. In the case of estimated repairs that have not been completed, if the claimant fails to provide an acceptable explanation for not having completed the repairs, a further risk adjustment is applied to the valuation amount. The Panel decides that a claimant's decision not to resume the business after liberation constitutes an acceptable explanation for not having undertaken the repairs.

C. Tangible property claims

92. Ninety-five claimants in the sixth instalment asserted claims aggregating USD 12,938,424.00 for loss of tangible property, defined as any loss of (but not repair to) any business property, equipment or machinery excluding real property, fixtures to real property, business vehicles, cash and stock in trade. Claims for repair of tangible property are treated as incremental costs incurred by the claimant and valued under the Incremental Costs review programme.

1. Compensability

93. Tangible property claimants are required to prove the existence and their ownership of the tangible property in question. In the Pilot Group this was typically proved through receipts evidencing purchase of the property and detailed lists of stolen or destroyed property. These detailed lists contained descriptions of items, numbers of items of each type, dates of purchase, purchase prices, claimed amounts, any depreciation of the assets, and similar information. Other documents provided by claimants included police reports, photographs of lost assets, replacement invoices, audited or unaudited accounts showing the book value of the assets, insurance documents evidencing coverage for the asset and witness statements.

94. Claimants must also prove loss of the tangible property as a direct result of Iraq's invasion and occupation of Kuwait. In the Pilot Group this was typically proved by witness statements, police reports,

photographs showing the destroyed asset, the claimant's statement and other similar documents.

2. Valuation method

95. Where a claim for loss or destruction of tangible property passes the legal test for compensability, the claim proceeds to valuation. Each tangible property claim is given an evidence score based on the type and quality of evidence provided. To prove the value of the lost or destroyed tangible property and thereby build an evidence score, a claimant may provide conclusive evidence of the existence and ownership of the business, internally generated business documents showing the value of the asset, third party confirmations of the value of the asset, documents showing the age of the asset, documents showing the cost of replacing the asset, a witness statement regarding the loss and other similar documents.

96. The valuation assessment of tangible property claims is based on historic cost, replacement cost or market value. If a claimant has not clearly stated the basis of the valuation, the claim is valued based on market value. The value of all assets is subject to appropriate adjustment for depreciation.

D. Stock claims

97. One hundred and eleven claimants in the sixth instalment asserted claims aggregating USD 44,489,003.00 for loss of stock, defined as loss or damage to the stock in trade of a business, that is the raw materials, work-in-progress and finished goods maintained by the business for manufacture, trade, sale or distribution. While stock does not normally include claims for vehicles or cash, these items are valued as stock if they are held as stock (this applies in the case of car dealers and currency exchange businesses).

1. Compensability

98. Stock claimants are required to prove the existence and their ownership of the stock in question. In the Pilot Group this was typically proved through stock takes, receipts evidencing stock purchases and detailed lists of stolen or destroyed stock. These detailed lists included descriptions of the items, numbers of items of each type, dates of purchase, purchase prices, claimed amounts and any obsolescence or slow-moving stock provision applied. Other documents provided by claimants included police reports, replacement invoices, audited or unaudited

accounts showing the book value of the stock, insurance documents evidencing coverage for the stock and witness statements.

99. Claimants must also prove loss of the stock as a direct result of Iraq's invasion and occupation of Kuwait. In the Pilot Group this was typically proved by witness statements, police reports, the claimant's statement and photographs showing the destroyed stock.

2. Valuation method

100. Where a claim for loss or destruction of stock passes the legal test for compensability, the claim proceeds to valuation. Each stock claim is given an evidence score based on the type and quality of evidence provided. To prove the value of the lost or destroyed stock and thereby build an evidence score, a claimant may provide evidence of the existence and ownership of the business, internally generated business documents showing the value of the stock, invoices showing stock purchases (a higher score is given for invoices dated within six months of the invasion), documents showing the stock balance in the period immediately prior to Iraq's invasion of Kuwait and a witness statement regarding the loss.

101. All stock claims are subject to downward adjustment for obsolescence, with the exception of cash held as stock. The obsolescence adjustment varies depending on whether the stock is considered to have a high, medium or low obsolescence.

102. Cash held as stock is not subject to a downward adjustment for obsolescence. It is, however, subject to a significant downward adjustment based on the risk of overstatement of cash claims.

E. Livestock and agricultural products

103. Five claimants in the sixth instalment asserted claims aggregating USD 1,650,740.00 for the loss of livestock and agricultural products, defined as loss of or damage suffered by a business with respect to animals kept for pleasure, breeding or slaughter, as well as loss of or damage to crops, feed or other agricultural products. As expected, all claims of this type advanced in the sixth instalment are for losses suffered in Kuwait. The Panel defers any consideration of the valuation method to be applied for livestock and agricultural products claims where the alleged losses were suffered outside of Kuwait.

1. Compensability

104. Livestock and agricultural products claimants are required to prove the existence and their ownership of the animals or items in question. In the Pilot Group, this was typically proved through detailed statements and lists, together with supporting evidence. The lists included descriptions of the age and gender of the livestock, numbers of animals, dates of purchase, purchase prices and claimed amounts. For agricultural products, the lists described the lost items, numbers of items of each type, dates of purchase, purchase prices, claimed amounts and any obsolescence applied.

105. The evidence submitted by claimants included Kuwait Government inventories of livestock and agricultural products, typically based on farm inspections undertaken prior to Iraq's invasion and occupation of Kuwait. Other evidence included inventories taken by the claimants, receipts, witness statements, replacement invoices, farm accounts and photographs.

106. Claimants must prove the loss of livestock and agricultural products as a direct result of Iraq's invasion and occupation of Kuwait. In the Pilot Group, this was typically proved by witness statements, photographs showing the damaged farm or agricultural enterprise and the claimant's statement.

2. Valuation method

107. Claims for livestock and agricultural products are either claims for the tangible property or the stock of a farm enterprise. As such, the first valuation exercise undertaken with respect to claims for livestock and agricultural products is to determine if the claim (or portion of the claim) is in the nature of a claim for tangible property or for stock. As an example, chickens kept for sale (as meat or for breeding) are in the nature of stock, while the chickens owned by an egg farm are in the nature of tangible property. This characterisation determines the evidence scoring to be applied; the same evidence scoring system developed for tangible property and stock claims is applied to claims for livestock and agricultural products (modified as necessary to take into account the nature of the property).

108. The valuation assessment of livestock and agricultural products is based on the method developed by the "D1" Panel for similar claims advanced as "D4 (personal property) claims. 15/ In short, the valuation exercise is designed to determine a 1990 Kuwaiti market value for the lost or damaged livestock or agricultural products. By adopting this approach, the Panel

maintains valuation consistency for similar claims filed on different pages of the category "D" claim form.

F. Cash claims

109. Six claimants in the sixth instalment asserted claims aggregating USD 298,721.00 for loss of cash, defined as a loss of cash held on the business premises resulting from cash transactions made during the ordinary course of business. Loss of the value of currency resulting from the demonetisation of the Kuwaiti dinar is treated under the Invalid Kuwaiti dinar review programme. Loss of currency, where such currency was held as the stock in trade of the business, is treated under the Stock review programme.

1. Compensability

110. Cash claimants are required to prove the existence and their ownership of the cash in question. In the Pilot Group this was typically proved through a detailed statement together with supporting evidence. This evidence included cash books or ledgers showing daily balances of cash-in-hand and financial statements within one year of the date of the invasion showing separately the cash-in-hand balance as at the date of the balance sheet. Other evidence provided by claimants included bank statements showing a sum of cash withdrawn shortly before the invasion or a remittance slip by a creditor of the business confirming that a cash amount was paid to the business on the day before or the day of the invasion.

111. Claimants must also prove loss of the cash as a direct result of Iraq's invasion and occupation of Kuwait. In the Pilot Group this was typically proved by witness statements, police reports, the claimant's statement and other similar documents.

2. Valuation method

112. Where a claim for loss of cash passes the legal test for compensability, the claim proceeds to valuation. Each cash claim is given an evidence score based on the type and quality of evidence provided. To prove the value of the lost cash and thereby build an evidence score, a claimant may provide evidence of the existence and ownership of the business, documents indicating cash level at any one time, third party confirmation of cash held at the date of the invasion and a witness statement regarding the loss.

113. All cash claims are subject to a significant downward adjustment based on the risk of overstatement of cash claims.

G. Invalid Kuwaiti dinars

114. There were no claims in the sixth instalment that asserted loss of the value of currency, that is, losses associated with the demonetisation of Kuwaiti dinars. The Panel finds that should claims for invalidated Kuwaiti dinars be encountered in the context of a D8/D9 business loss, the same approach as currently used by the "D1" Panel will be adopted for determining the compensability and valuation of such losses. 16/

H. Bank accounts or securities in Iraq

115. There were no claims in the sixth instalment that, after reclassification, asserted loss of securities or bank accounts in Iraq, defined as the loss of funds from a bank account held by a business in Iraq. The Panel defers any decision in respect of the compensability or valuation of losses arising from an Iraqi bank account held by a business until such a claim is before it for consideration. The Panel defers any decision in respect of the loss of securities until such a claim is before it for consideration.

I. Bank accounts or securities in Kuwait

116. There were no claims in the sixth instalment that, after reclassification, asserted loss of securities or bank accounts in Kuwait, defined as the loss of funds from a bank account held by a business in Kuwait. The Panel defers any decision in respect of the compensability or valuation of losses arising from a Kuwaiti bank account held by a business until such a claim is before it for consideration. The Panel defers any decision in respect of the loss of securities until such a claim is before it for consideration.

J. Vehicles

117. Twenty-one claimants in the sixth instalment asserted claims aggregating USD 6,699,412.00 for loss of business vehicles, defined as any conveyance for transport used in connection with the business being claimed for. This does not include claims by car dealers with respect to vehicles held for sale; those claims are treated as claims for stock. In addition, this does not include claims for vehicle repair costs, which are treated as incremental costs incurred by the business claimant.

1. Compensability

118. Business vehicle claimants are required to prove the existence and their ownership of the vehicles in question. In the Pilot Group this was typically proved through vehicle registration cancellation certificates ("deregistration" or "drop" certificates) issued by the Government of Kuwait to establish the existence of vehicles before Iraq's invasion of Kuwait and to establish the claimant's ownership interest in those vehicles.

119. Claimants must also prove loss of the business vehicle as a direct result of Iraq's invasion and occupation of Kuwait. The Panel does not accept Kuwaiti deregistration certificates as proof of loss without other evidence, such as witness statements, police reports or post-liberation accounts or business records recording the loss of vehicles. 17/ A causation presumption may arise if a vehicle was left in Iraq or Kuwait prior to or during the invasion and occupation, and was lost, that it was lost as a direct result of Iraq's invasion and occupation of Kuwait. This presumption will only operate where a detailed explanation of the circumstances is provided. 18/

120. The Panel recognises that the legal test for compensability described above is somewhat more strict than the legal test applied for personal vehicles under the D4 (MV) methodology; the Panel considers this more stringent test to be justified in the case of business vehicles.

2. Valuation method

121. Where a claim for loss or destruction of business vehicles passes the legal test for compensability, and the claimant has provided a deregistration certificate, the value of the vehicle is assessed by reference to a motor vehicle valuation table (the "MVV Table"). The MVV Table was provided to the Commission by PAAC. 19/ The Panel notes that the values on the MVV Table were independently verified by valuation experts for the "D1" Panel. 20/

122. The Panel notes that some claimants are not able to provide deregistration certificates. This may be as a result of their absence from Kuwait, or because the vehicle in question was not registered in Kuwait (as in the case of vehicles in Iraq, and some Kuwaiti farm vehicles).

123. In the absence of a deregistration certificate, an evidence score is calculated. This takes into account witness statements provided by the

claimant, documents generated internally by the claimant's business, third party confirmations, and the evidence of value provided by the claimant (including the age of the vehicle, the manufacturer and the model). This evidence score is multiplied by the value appearing on the MVV Table, or by the valuation resulting from the calculation described below.

124. Where the vehicle in question does not appear on the MVV Table, the valuation is assessed by reference to the age, make and model of the vehicle. The Panel arrives at a 1990 market value for the subject vehicle by depreciating or appreciating from known values, in the same manner as established by the "D1" Panel for D4 (MV) claims. 21/

K. Loss of business income claims

125. One hundred and nineteen claimants in the sixth instalment asserted claims aggregating USD 53,669,603.00 for loss of business income, defined as a loss of monies normally received on a periodic basis as the proceeds, earnings or receipts of the business claimed for, excluding monies expected on a contract or series of contracts and money expected as an existing receivable of the business.

1. Compensability

126. Loss of business income claimants are required to prove that the loss was caused as a direct result of Iraq's invasion and occupation of Kuwait. For those claimants with businesses in Kuwait, a causation presumption arises in that businesses located in Kuwait were unable to operate normally during the period of Iraq's occupation. For those claimants with businesses outside of Kuwait, a case by case causation assessment was undertaken by the Panel.

127. Loss of business income claimants are also required to prove that the subject business had a history of profitability, or a reasonable expectation of profitability during the period of loss. In other words, it is not sufficient for the claimant to demonstrate a loss of income alone. The claimant must demonstrate that after expenses are deducted from the revenue of the business, profit existed, or had a reasonable prospect of existing, during the period of loss. In general terms, evidence that the subject business was not profitable in the pre-invasion period, or that the business had no reasonable expectation of profitability, results in this element of the claim not being recommended for compensation. Similarly, a complete lack of information on either the revenues or the expenses of the business results in this element of the claim not being recommended for compensation.

128. As an example of this principle, one claimant claimed for a loss of income from his farming operation. The only evidence of income provided was evidence of the subsidy previously received by the claimant from the Government of Kuwait. No information was provided concerning his pre-invasion farming expenses. In the circumstances, the Panel is unable to determine whether this claimant suffered any net loss of business income as a result of Iraq's invasion and occupation of Kuwait, and this element of the claim is therefore recommended for no compensation. Other farm claims in the sixth instalment have been recommended for compensation for loss of business income where a complete picture of the pre-invasion income (including sale and subsidy income) and expenses of the business were provided.

129. The Panel is also concerned about the issue of potential windfall profits in the post-liberation period in Kuwait. This issue was raised in the "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E4" Claims" with respect to claimant businesses experiencing profit increases after the liberation of Kuwait:

> "... in some cases, a review of the evidence submitted reveals that there is a high likelihood that a direct cause for the rise in profits was Iraq's invasion and occupation of Kuwait rather than any specific efforts undertaken by the claimant to develop its business. For example, automobile dealerships and construction companies in Kuwait could show such windfall profits in the period immediately following the liberation of Kuwait because the damage caused during the period of the occupation resulted in a sharp increase in demand for the products and services offered by such companies post liberation." 22/

130. As a result of this concern, the Panel requests and reviews post-liberation financial results where businesses resumed operations. Windfall profits were not identified in any sixth instalment claims. As a result, the Panel defers any decision on how to treat such claims pending the identification of a claim presenting such issue.

2. Period of loss

131. Claimants in the sixth instalment seek compensation for loss of business income for varying periods of time. The Panel notes that the sixth instalment claims population includes losses of business income suffered both inside and outside Kuwait, and also losses suffered both by businesses that resumed operations post-liberation and by businesses that never reopened. In this regard, the category "D" business income losses

resemble the loss of profits claims advanced by corporate entities in the "E4" (for businesses in Kuwait) and "E2" (for businesses outside of Kuwait) groups of claims.

132. The Panel has accordingly been guided in its work by the "period of loss" determinations made by the "E4" and "E2" Panels, as reflected in the "E4" First Instalment Report. 23/ The Panel has also paid particular attention to paragraph 7 of Governing Council decision 15, which states:

> "[I]n the case of a business which has been, or could have been, rebuilt and resumed, compensation would be awarded for the loss from the cessation of trading to the time when trading was, or could have been, resumed. In the case of a business or course of trading which it was not possible to resume, the Commissioners would need to calculate a time limit for compensation for future earnings and profits, taking into account the claimant's duty to mitigate the loss wherever possible."

133. The general principles outlined by the "E2" and "E4" Panels on the period of loss issue may be summarized as follows:

(a) For businesses that continued or resumed operations after the liberation of Kuwait, compensation may be awarded for the period until the claimant did or could have resumed operations at pre-invasion capacity.

(b) For businesses that did not resume operations, compensation may be awarded for the seven month period of Iraq's invasion and occupation of Kuwait. For such claimants to receive compensation for a longer period, they must clearly demonstrate that the period beyond the seven months had as a separate and distinct cause Iraq's invasion and occupation of Kuwait.

134. The Panel is also mindful of the large numbers of category "D" claims for loss of business income, and the resulting difficulty of doing a case by case assessment of the period of loss for businesses in and outside of the affected region. Accordingly, and based on the advice of its expert accounting consultants, the Panel generally applies a 12 month period of loss for business income claimants where the business resumed and the location of the business is Kuwait or Iraq. In cases where a business located in Kuwait or Iraq did not resume after liberation, the Panel imposes a seven month limitation on the period of loss. Similarly, the Panel generally applies a period of loss from 15 January 1991 to 2 March 1991 for business income claimants where the business resumed and the location of the business was other than Kuwait or Iraq. 24/

135. These loss periods are not applied where the claimant can clearly demonstrate an extraordinary reason for a longer period of time needed to resume operations at pre-invasion capacity. An example of this principle in the sixth instalment is a farm claimant who proved that his farm had been land-mined, and that removing the mines had been a lengthy process delaying the resumption of his business. In that circumstance, the Panel fixed an 18 month period of loss for the business income claim. The Panel will continue to review individual claims for such extraordinary circumstances, and where clear evidence is provided by the claimant justifying a longer period of loss, then such evidence will be taken into account by the Panel.

136. The Panel also notes that the period of loss forming the basis of an award cannot, in any circumstance, exceed that advanced by the claimant.

3. Valuation method

137. Where a claim for loss of business income passes the legal test for compensability, the claim proceeds to valuation. Each loss of business income claim is given an evidence score based on the type and quality of evidence submitted.

138. To build an evidence score, a claimant may provide a witness statement describing the income lost and specifying the period of loss, with a detailed explanation of saved business expenses. Documentary evidence considered includes evidence of pre-invasion periodic income and periodic expenses, showing net results for the business. Additional evidence scores may be obtained by proving annual pre-invasion business results, and for providing results for the three years before Iraq's invasion and occupation of Kuwait.

139. A full evidence score is most easily obtained by claimants able to provide pre-invasion financial statements and accounts. However, there was no legal requirement for most unincorporated businesses in Kuwait to prepare such accounts before Iraq's invasion and occupation of Kuwait. Accordingly, it is possible to achieve a full evidence score through alternative evidence proving the pre-invasion receipt of periodic income over time, and proving the periodic expenses of the business for the same period. Such alternative evidence includes management records, profit forecasts, and other similar documents.

140. Large claims for loss of business income with limited financial records are, however, subjected to an evidentiary score penalty if the claimant produces limited financial documentation. This penalty is

designed to minimise the risk of overstatement associated with such claims, where the Panel would expect to see better evidence.

141. The valuation assessment for loss of business income claims is essentially a process of calculating the loss on a periodic basis, and adjusting the loss to the compensable loss period as described above. As with other loss types, the adjusted amount is then multiplied by the evidence score to reach a recommended award.

142. The valuation process for loss of business income claims involves a review of post-invasion results wherever applicable. As noted above, this review is, among other things, designed to identify any claims where windfall profits may have been earned in the post-invasion period. Such claims will be dealt with individually by the Panel.

143. The valuation adjustments described above have had the effect of significantly reducing many of the loss of business income claims advanced in the sixth instalment. Larger adjustments often resulted from restricting the claims to the compensable period. Other adjustments resulted from the limitations of the evidence. If a claimant is, however, able to meet the basic evidentiary requirements for loss of business income, then that portion of the claim will not be adjusted to less than a conservative minimum monthly threshold level, multiplied by the compensable period of loss. In other words, individual claimants proving the existence and ownership of their business, and proving a loss of net business income from that business, will not have their claims reduced to nil based on an application of the various adjustments described above.

L. Contracts

144. Although contract losses are not one of the specified loss types appearing on the D9 page of the claim form, claimants asserted contract losses arising under a number of different fact patterns. Nine claimants in the sixth instalment asserted claims aggregating USD 8,215,027.00 arising from contract losses, defined as any loss of expected income from a contract or a series of contracts to which the claimant or his business was a party.

145. Some of the asserted contract losses were recategorised into either receivables, loss of business income or incremental costs, as the circumstances of loss suggested treatment consistent with these aspects of the D8/D9 methodology. In those cases where a distinct contract loss can be identified, the loss is assessed as follows.

1. Compensability

146. Claimants claiming for contracts that have been cancelled, interrupted or not performed are required to prove that the loss was caused as a direct result of Iraq's invasion and occupation of Kuwait. For those claimants with businesses in Kuwait, a causation presumption arises in that businesses located in Kuwait were unable to operate normally during the period of Iraq's occupation. For those claimants with businesses outside of Kuwait, the Panel undertook a case by case causation assessment.

147. The claimant is required to prove the existence of the contract and its specific terms, including the identity of the parties to the contract, the term, the expected income and expenses from the contract, as well as the details of performance. In the Pilot Group this was typically proved through the contract itself, management or other financial accounts, correspondence between the parties and witness statements.

148. The Panel also considers pre-invasion results to determine whether the contract loss claimed for is consistent with the past performance of the business. In the Pilot Group, pre-invasion management accounts, statements of income and expenses, financial statements, profit forecasts and accountant's reports were considered as evidence of pre-invasion results.

149. Consistent with loss of business income claims, the Panel is also concerned about the issue of potential windfall profits in the post-liberation period arising in contract loss claims. As a result of this concern, the Panel requests and reviews post-liberation financial results where businesses resumed operations. Windfall profits arising from contract loss claims were not identified in any sixth instalment claims. As a result, the Panel defers any decision on how to treat such claims pending the identification of a claim presenting such issue.

2. Period of loss

150. Claimants in the sixth instalment seek compensation for contracts with varying terms. The Panel notes that the sixth instalment claims population includes contract losses suffered both inside and outside Kuwait, and also losses suffered both by businesses that resumed operations post-liberation and by those that did not. In this regard, the category "D" contract losses resemble the loss of business income claims.

151. Because the valuation method considers the remaining term of the contract in arriving at the recommended award, the Panel considers whether

similar periods of loss should apply for contract losses and for loss of business income. In cases where the business did not resume after liberation, the Panel imposes a similar seven month limitation on the period of loss. Where the business resumed, a period of up to 12 months may be recommended. In the Pilot Group, no claimant demonstrated extraordinary circumstances justifying an indemnity period longer than 12 months.

152. The Panel also notes that the period of loss forming the basis of an award cannot, in any circumstance, exceed that advanced by the claimant.

3. Valuation method

153. Where a claim for a contract loss passes the legal test for compensability, the claim proceeds to valuation. Each contract loss is given an evidence score based upon the type and quality of evidence provided. To prove the value of the contract loss and thereby build an evidence score, a claimant may provide a witness statement setting out expected revenue from the contract, the contract term and details of expenses, management accounts, financial statements, profit forecasts and accountant's reports showing either periodic or annual results.

154. If the claimant cannot provide this type of periodic information, the claimant may build an evidence score through the provision of the contract itself, payment vouchers or other proof of payment and correspondence between the parties referring to the terms of the contract and the details of performance. Where the Panel considers the value of the loss claimed to be significant, and the claimant has failed to provide the appropriate periodic financial information, an adjustment is applied to the claim to account for the risk of overstatement.

155. Valuation of contract loss is based on multiplying the net monthly income expected from the contract against the remaining term of the contract. Where the claimant has not clearly demonstrated the proportion of the contract completed or the time elapsed on the contract, the Panel assumes that the contract is half way through its term and the appropriate adjustment is applied. As described under Period of loss, above, the remaining term of the contract is limited to up to seven months for a business that did not resume after the liberation of Kuwait and up to 12 months for those that did resume.

156. The calculated unbilled portion of the contract is then compared against the amount based on the time remaining in the contract term and the

lower of the two is multiplied against the evidence score to generate the recommended award.

M. Receivables

157. Twenty-two claimants in the sixth instalment asserted claims aggregating USD 5,734,660.00 for receivables, defined as losses suffered as a result of the inability of a business to collect an outstanding amount owing to it.

158. The receivables claims in the sixth instalment may be divided into two basic types of claims.

159. The first type of claim is filed by claimants who are owed significant amounts of money under the terms of a specific contract for the sale of goods or services that was partially or fully performed before Iraq's invasion and occupation of Kuwait. An example of such a claim is a construction contractor who is owed money for partial performance under specific construction contracts that were interrupted as a result of Iraq's invasion and occupation of Kuwait.

160. This type of claim will generally be supported by documentation of the specific transaction that gave rise to the debt and will include some documented efforts to collect money owed, usually in the form of correspondence with the debtor.

161. The second type of receivables claim is asserted by merchants in Kuwait who sold goods on credit to their customers before Iraq's invasion and occupation of Kuwait. An example of such a claim is an electronics retailer who sold electronic goods by instalment payments and had, at the time of the invasion, a list of debtors in good standing who were making payments on purchases. Another example is a claim made by a food wholesaler who made weekly deliveries to local grocers on account. These types of claims will generally have detailed documentation regarding the numerous, usually small, debts owed by their clientele.

162. This second type of claim is unlikely to be supported by documented debt collection efforts for each individual debtor. The best evidence of debt collection efforts likely to be provided in support of these claims is evidence that a debt collector was hired and documentation regarding any debts that were collected. Even claimants who hired debt collectors were largely unsuccessful in their debt collection efforts as the non-Kuwaiti clients (who accounted for the majority of the debtor population in the Pilot Group of claims) had left Kuwait after the invasion.

163. The compensability of receivables claims is an issue that has been the subject of a decision by the "E4" Panel. 25/ It is worth noting that the majority of sixth instalment receivables claims appear to differ significantly in type from the receivables claims filed in the "E4" group of claims.

164. The reported "E4" receivables claims were for debts owed to Kuwaiti corporations. The size of the average receivables claim exceeded USD 500,000. 26/ The debts were owed by businesses, whether incorporated or unincorporated.

165. In contrast, the majority of sixth instalment receivables claims are filed by non-Kuwaiti claimants who operated unincorporated businesses in Kuwait. Their claims are typically for a large number of small debts owed by their primarily non-Kuwaiti customers, usually individuals, who are likely to have left Kuwait after the invasion.

1. Compensability

166. Receivables claimants are required to prove the existence and their ownership of the receivable in question. In the Pilot Group this was typically proved through promissory notes, post-dated cheques, contracts with future payment obligations, repayment schedules, invoices, loan documentation, detailed lists of debtors and debts, unaudited or audited business records containing information regarding outstanding debts, witness statements and correspondence with debtors.

167. Claimants are also required to prove that the receivable was uncollectable as a direct result of the invasion and occupation of Kuwait.

168. Based on the review of claims, it appears that before Iraq's invasion and occupation of Kuwait, many merchants in Kuwait offered credit sales to their customers and successfully collected on these debts. Iraq's invasion and occupation of Kuwait drastically interfered with the regular payment of debts that merchants had previously experienced. Iraq's invasion and occupation of Kuwait also resulted in the scattering of customers around the world and often the destruction or loss of the documents that contained detailed information regarding the identity of the debtor and the amounts owed.

169. The Panel had to determine what proof could reasonably be required of D8/D9 claimants in order to demonstrate that a debt became uncollectable as a direct result of Iraq's invasion and occupation of Kuwait.

170. The "E4" Panel has previously considered the question of how a claimant may demonstrate that a particular receivable was uncollectable as a direct result of Iraq's invasion and occupation of Kuwait. 27/ The "E4" Panel requires a claimant to provide evidence of formal debt collection efforts in order to make this showing. The "E4" Panel looks for documents such as court records showing debt collection efforts in Kuwaiti courts; court records demonstrating the debtor's absence from Kuwait at the end of the invasion period; Kuwait Chamber of Commerce and Industry certificates stating that a company did not resume operations after the invasion period; and certificates from the Kuwait Ministry of Labour and Social Affairs stating that a debtor had been declared bankrupt following the invasion. If no formal debt collection attempts have been documented, and no reasonable explanation given for why attempts have not been made, no compensation is recommended.

171. The Panel adopts the general approach of the "E4" Panel with respect to the compensability of receivables claims. The Panel, however, considers that a reasonable explanation for a failure to document individualised debt collection efforts is that the size of the debt was too small to warrant the expense of extensive debt collection efforts. Although claimants are required to mitigate their losses, reasonable mitigation efforts should not include debt collection efforts that are more costly than the amount of the underlying debt.

172. The Panel determines that for debts greater than KWD 500, a debt is considered non-compensable if the claimant fails to document adequate debt collection efforts. If the debt is for KWD 500 or less, a claim will be compensable, subject to remaining legal and valuation issues, even if a claimant has not documented debt collection efforts.

173. The Panel adopts this approach based on its findings regarding the specific characteristics of the receivables claims in the sixth instalment.

174. For debts over KWD 500, the fact that a debt was uncollectable as a direct result of the invasion and occupation of Kuwait would be proven by the same type of documents required by the "E4" Panel. These documents may include the claimant's statement; witness statements; information regarding the collectability of a business' debts before the invasion; information regarding the age of the debt; letters or other documents showing debt collection efforts; documents showing that a debtor did not resume operations after the invasion and occupation of Kuwait; certificates from the Kuwait Ministry of Commerce and Industry, Directorate of Commercial Registration, stating a business did not resume operations after the invasion and occupation of Kuwait; court records of debt collection proceedings; and bankruptcy notices.

175. No claimant in the sixth instalment was able to demonstrate formal debt collection efforts for receivables over KWD 500. Accordingly, for all claims of this type, the Panel recommends no award of compensation.

176. For debts of all sizes, it is necessary to determine whether there is evidence that suggests that the debt was uncollectable prior to the invasion of Kuwait. If such evidence exists, the Panel recommends no award of compensation.

2. Valuation method

177. Where a receivables claim passes the legal test for compensability, the claim proceeds to valuation. Each of the three types of receivables claims (debts less than or equal to KWD 500, debts greater than KWD 500, and debts owed by an Iraqi party) are valued differently.

178. Debts less than or equal to KWD 500 are given an evidence score based on the type and quality of evidence provided. To prove the loss, and thereby build an evidence score, a claimant may provide evidence of the existence and his ownership of the business, evidence of debts in the aggregate, evidence of debts broken down by debtor, information regarding the business' historic treatment of bad and doubtful debts, information regarding the age of each debt, evidence of formal and informal debt collection efforts, circumstantial and conclusive evidence of the value of the debt, a witness statement regarding the debts owed and other similar documents.

179. In addition, claims for receivables equal to or less than KWD 500 are subject to valuation adjustments based on inconsistent evidence in the claim file and for a failure to apply a bad debt provision in calculating the amount of the loss.

180. Debts greater than KWD 500 are given an evidence score based on the type and quality of evidence provided. Similar evidence is used to build an evidence score, though the claimant is given no evidentiary credit for showing formal debt collection efforts, as such a showing was required to pass the legal review. These claims are subject to the same valuation adjustments based on contradictory evidence of value in the claim file and are subject to the downward adjustments applied by the "E4" Panel for failure to show that a debtor was bankrupt or insolvent as a direct result of Iraq's invasion and occupation of Kuwait. No claim in the sixth instalment has been valued under the greater than KWD 500 valuation method as all such claims failed the legal review.

181. Claims for receivables owed by Iraqi parties are subject to a different legal test. The Panel adopts the general principles with respect to these receivables as set forth in "E2" Fourth Instalment Panel Report. 28/

182. As no claim for receivables owed by an Iraqi party passed the legal review for compensability, the Panel defers any detailed discussion of the compensability or valuation of losses arising from receivables owed by an Iraqi party until a compensable claim is before it for consideration.

N. Rent-a-Permit claims

183. Two claimants in the sixth instalment asserted claims aggregating USD 158,477.00 for loss of rental income based on rent-a-permit arrangements. "Rent-a-permit" arrangements were first considered by the category "C" Panel in its first and seventh reports. 29/ The category "C" Panel noted that the most common form of business in Kuwait was the sole proprietorship, primarily used by small businesses, which had no separate legal identity. In the period prior to Iraq's invasion, Kuwaiti law required that a person who wished to start a business obtain a permit from the Ministry of Commerce and Industry. In principle, only Kuwaiti nationals qualified for such a permit. The category "C" Panel took note of the existence of a common practice whereby a person who wished to undertake commercial activities rented a permit from the Kuwaiti permit owner. 30/

184. The Panel notes that the observations of the category "C" Panel with regard to the rental of business permits also applies to many of the D8/D9 claims. This means that many of the individual business losses filed by non-Kuwaiti claimants in category "D" are businesses operated under a rent-a-permit arrangement. It also means that there are a significant number of claims by the permit owner for the loss of rent associated with the rent-a permit arrangement. It is this latter type of claim, including claims for the loss of rental income derived from a business permit that has been rented to a third party, that is discussed in this section.

1. Compensability

185. As in the case of loss of business income claimants, rent-a-permit claimants are required to prove that the loss of rent was a direct result of Iraq's invasion and occupation of Kuwait. Similar causation presumptions also apply. Thus, a rent-a-permit claimant with a business located in Kuwait is presumed to have been unable to collect past-due rents during the period of Iraq's occupation of Kuwait.

186. Rent-a-permit claimants are required to satisfy two legal tests; failure to satisfy either one results in failure of the claim. First, like other business loss claimants, rent-a-permit claimants are required to establish, either through circumstantial or conclusive evidence, the existence of the underlying business that was the subject of the rent-a-permit arrangement.

187. Second, rent-a-permit claimants are required to establish the existence of the rent-a-permit arrangement by submitting any of the following documents: (1) an agreement evidencing the rental of the business permit dated prior to the date of Iraq's invasion of Kuwait (the "rent-a-permit contract"); (2) a pre-invasion statement from the claimant that acknowledges the fact that he had rented the business permit to a permit renter and that he had no interest in the capital of the business; or (3) the business permit and either (a) a post-invasion statement from the permit renter that confirms the rent-a-permit arrangement as alleged by the claimant, or (b) a pre-invasion receipt or invoice that evidences payment of the monthly rent.

188. In the Pilot Group, rent-a-permit claimants were able to establish these legal requirements by providing a copy of the business permit, the contract establishing the rent-a-permit arrangement, or invoices relating to this arrangement.

2. Period of loss

189. Rent-a-permit claimants in the Pilot Group seek compensation for loss of rental income for varying periods of time. While all of the underlying businesses were located inside Kuwait, not all of the underlying businesses resumed operations after the liberation of Kuwait.

190. For rent-a-permit claims, the Panel applies the same legal analysis for the determination of the period of loss as in the case of loss of business income claims. Accordingly, where the rent-a-permit arrangement resumed after Kuwait's liberation, the Panel recommends a loss period of up to 12 months. If the underlying business did not resume operations, however, the Panel recommends a loss period of up to seven months. No claimant alleged extraordinary circumstances justifying a loss period greater than 12 months.

3. Valuation method

191. If the rent-a-permit claim passes the legal tests for compensability, the claim proceeds to valuation. Rent-a-permit claims are given an

evidence score based on circumstantial or conclusive evidence of the existence of the rent-a-permit arrangement and the fact that rent payments were made pursuant to this arrangement. As to the existence of the rent-a-permit arrangement, a claimant receives an evidentiary score for submitting the pre-invasion rent-a-permit contract, the claimant's pre-invasion statement acknowledging the rent-a-permit arrangement, or the business permit coupled with either a post-invasion statement from the permit renter that confirms the rent-a-permit arrangement, or a pre-invasion receipt or invoice that evidences payment of the monthly rent.

192. With respect to proving the fact of rent payment under the rent-a-permit arrangement, a claimant receives an evidentiary score for submitting a pre-invasion invoice or receipt evidencing such payment. No evidentiary score is given if any of the foregoing documentation is dated more than five years from the date of Iraq's invasion of Kuwait.

193. In addition, rent-a-permit claims are subject to valuation adjustments if contradictory evidence is present on the claim file or if the claimant fails to account for saved expenses relating to the rent-a-permit arrangement.

O. Goodwill/Key Money claims

194. Fourteen claimants in the sixth instalment asserted claims aggregating USD 1,748,315.00 for key money, defined as losses associated with the money paid for the right to lease a business premises. Twelve claimants in the sixth instalment asserted claims aggregating USD 1,758,428.00 for goodwill, defined as the loss of value of the reputation of a business.

1. Compensability

195. Key money and goodwill claimants are required to prove the existence and their ownership of the asset in question. In the Pilot Group this was typically proved through lease documents reflecting key money payments made, receipts showing payment of key money, unaudited or audited business records containing information regarding key money and goodwill paid, sale or offer documents indicating the amount of the purchase price expressly allocated to key money or goodwill and witness statements.

196. Claimants must also prove that the key money and goodwill was lost as a direct result of Iraq's invasion and occupation of Kuwait. In the Pilot Group this was typically proved by witness statements, information regarding damage done to business premises for which the key money or

goodwill was paid, information regarding the resale value of the key money and goodwill in the post-invasion period and the claimant's statement.

197. As part of the legal review, the Panel also requires the claimant to provide evidence of efforts to mitigate the key money or goodwill loss. Such evidence includes documents demonstrating efforts made to recover key money payments from the original landlord, documents showing attempts to sell the war-damaged business, documents showing the appointment of an agent to sell the war-damaged business, documents showing that any portion of the key money was actually recovered, and other similar documents. If the claimant provides such evidence and meets all other legal requirements, the claim proceeds to valuation. If the claimant does not provide such evidence, the amount claimed is subject to a significant downward adjustment before the claim proceeds to valuation.

198. The review also assesses whether any aspect of the key money or goodwill claim is unduly speculative. This legal test focuses on claims for goodwill or key money that are not documented by reference to an historical expenditure or other verifiable evidence of value. For example, a claimant who asserts that his business had goodwill valued at KWD 10,000 but has provided no documentary evidence indicating the value of the goodwill will be awarded no compensation as the claim will be considered unduly speculative. Similarly, a claim for appreciation on key money paid will also be considered unduly speculative and non-compensable unless the claimant can provide evidence sufficient to demonstrate the amount of the appreciation.

2. Valuation method

199. Where a claim for key money or goodwill passes the legal test for compensability, the claim proceeds to valuation. Each such claim is given an evidence score based on the type and quality of evidence provided.

200. To prove the value of key money or goodwill and thereby build an evidence score, a claimant may provide evidence of the existence and ownership of the business, information regarding the historic cost of obtaining the key money or goodwill of the business, internally generated documents showing key money or goodwill payments made, offers to buy the business that contain an allocated amount for key money or goodwill, third party confirmations of key money or goodwill payments, a witness statement regarding the loss and other similar documents.

P. Incremental costs

201. Twenty claimants in the sixth instalment asserted claims aggregating USD 4,071,821.00 for incremental costs, defined as business expenses that would not have been incurred if Iraq's invasion and occupation of Kuwait had not taken place. These claims comprise costs such as post-liberation financing costs, repairs to tangible property, clean up and restart costs. This does not include claims for repairs to real property, which are treated under the Real Property Repair review programme.

1. Compensability

202. Incremental costs claimants are required to prove that the costs claimed were incurred as a direct result of Iraq's invasion and occupation of Kuwait. Further, these costs were typically incurred post-liberation, or were incurred outside of Kuwait or Iraq. Accordingly, the Panel requires proof that the incremental costs were actually incurred in the amounts stated by the claimants.

2. Valuation method

203. Given the nature of incremental costs claims, no streaming is undertaken for these losses. All incremental cost claims are valued in the same manner, and no evidentiary score is provided for submitting proof of the existence of the business.

204. The evidentiary scoring for incremental costs claims is based on documents confirming the responsibility for a compensable expense, documents confirming that the expense was actually incurred and specific witness statements. In addition, the Panel looks to documents confirming that the actual incremental costs were incurred (such as invoices and receipts) and documents confirming that the expenses were incurred within a reasonable period of time.

205. The Panel recognises that a business operating normally would incur repair and maintenance costs as part of its regular activities. Accordingly, most incremental cost claims include an element of cost that would have been incurred even if Iraq's invasion and occupation of Kuwait had not taken place. In the circumstances, and as the Panel cannot make a claim by claim assessment of this over-statement, a risk adjustment is applied to claims for incremental costs. The Panel is satisfied that this adjustment is conservative and appropriate in the circumstances.

206. The Panel is concerned that claims for incremental costs should not duplicate other losses advanced by the same claimant (for example, decline in income claims). The incremental costs valuation methodology is designed to ensure that duplication is identified and eliminated from the Panel's recommended awards.

V. CROSS CATEGORY ISSUES

A. Overlap with category "E4" claims

207. Prior to deferral, there were 13 claims in the sixth instalment filed by non-Kuwaiti (mostly Jordanian) shareholders of Kuwaiti corporations where there was also an overlapping claim filed with the Commission by the corporation in the "E4" group of claims. As with the "stand alone" claims described at paragraphs 211 to 213 below, these claims all relate to losses suffered by Kuwaiti W.L.L. enterprises. The distinguishing feature of these shareholder claims is the overlapping claim filed in the "E4" group of claims.

208. Some of these overlapping shareholder claims are advanced by claimants who assert legal ownership of a minority interest in the corporate entity that suffered the loss. These claimants typically assert a complete breakdown of the relationship with their Kuwaiti partner (and majority shareholder), and that a portion of the corporate loss ought to be paid directly to them.

209. Some of these overlapping shareholders claims are advanced by claimants who assert beneficial ownership of the entire corporate entity suffering the loss, through "side agreements" executed by the Kuwaiti and non-Kuwaiti shareholders, or based on written declarations signed by the Kuwaiti shareholder. These claimants typically assert that the Kuwaiti partner was a shareholder only for the purpose of compliance with Kuwaiti law, and that any award for this loss ought to be paid entirely to the non-Kuwaiti shareholder.

210. The Panel has initiated an investigation of the nature and scope of this claims overlap problem, in co-operation with the "E4" and "E4A" Panels. Pending the results of the investigation, and the receipt of guidance from the Governing Council, the Panel has decided to defer all 13 claims in the sixth instalment submitted by shareholders of Kuwaiti W.L.L. entities where there is a competing "E4" claim.

B. Other claims filed by shareholders

211. Prior to deferral, there were 17 claims in the sixth instalment filed by non-Kuwaiti (mostly Jordanian) shareholders of Kuwaiti corporations where there was no overlapping claim filed with the Commission by the corporation in the "E4" group of claims (the "stand alone" shareholder claims). These claims all relate to losses suffered by Kuwaiti W.L.L. enterprises. The distinguishing feature of these shareholder claims is the absence of an overlapping claim filed in the "E4" group of claims.

212. Almost all of these stand alone shareholder claims are advanced by claimants who assert beneficial ownership of the entire corporate entity suffering the loss, through side agreements executed by the Kuwaiti and non-Kuwaiti shareholders, or declarations of the Kuwaiti partner. These claimants assert that the Kuwaiti partner was a shareholder only for the purpose of compliance with Kuwaiti law, and that they are accordingly justified in advancing the only claim with respect to the underlying loss.

213. The Panel has initiated an investigation of the pre-invasion legal system and business practices in Kuwait. The Panel also considers that the problem of the stand alone shareholder claims is related to the overlapping claims problem described above. Pending the results of its investigations, and the receipt of guidance from the Governing Council, the Panel has decided to defer all stand alone shareholder claims in the sixth instalment.

C. Deductions of category "A", "B" and "C" awards

214. Recommended awards in respect of claims in this instalment are reported net of necessary deductions of category "A", "B" and "C" approved awards. 31/

215. For each category "C" award, the Panel compares the "C8" claim with the D8/D9 claim to determine if there is any duplication between the claims. If there is no duplication, no deduction is made.

216. Where duplication exists between the "C8" and D8/D9 claims, the Panel assesses whether the D8/D9 claim is a "spillover" claim, meaning that the claimant claimed the first USD 100,000 of his business loss in category "C", and the balance in category "D". In that case, the total loss is valued in category "D", and the "C8" award is deducted.

217. If there is duplication between the "C8" and the D8/D9 claims, and the D8/D9 claim is not a spillover claim, the Panel assesses whether the claims are "partial duplicates". In these cases, the claimant attempted to divide their losses between categories "C" and "D", but some element of overlap remains. In that case, the Panel identifies the element of overlap in the "C8" claim, and deducts an amount calculated to reflect the extent of the overlap.

218. In a few cases, the "C8" and D8/D9 claims were "full duplicates", meaning that the claim files (including amounts claimed) are identical. In those cases, if the total "C" award was less than USD 100,000, the Panel considered that the entire business loss was valued in category "C". Accordingly, the D8/D9 claim would be recommended for no award.

219. On the other hand, if the claims are full duplicates and category "C" capped the award at USD 100,000, then the entire loss is valued in category "D", and the "C8" award is deducted.

220. In some cases, the deduction of a category "C" award is in fact a deduction of a pro-rated amount. This occurs where there are multiple category "C" loss elements, and the "C" award was capped at USD 100,000. In such cases, the "C" award is pro-rated back to the "C" loss elements to reach an amount that can be deducted from the corresponding category "D" award.

VI. OTHER ISSUES

A. Applicable dates for currency exchange rate

221. Most category "D" business loss claimants have asserted their claims in Kuwaiti dinars. However, some claimants have asserted claims in other currencies as well. The Commission issues its awards in United States dollars, and so the Panel must determine the appropriate exchange rate to apply to losses or claims expressed in Kuwaiti dinars and other currencies.

222. The Panel finds that it is not possible to calculate the exchange rate separately for each individual business loss element or individual business loss claim. The Panel adopts the reasoning of the "D1" Panel on this issue, and finds that the currency exchange rates to be applied for processing and paying category "D" individual business loss claims are the same rates used for other category "D" losses. 32/

223. In short, for claims stated in Kuwaiti dinars, the currency exchange rate to be applied is the rate of exchange in effect immediately prior to

Iraq's invasion and occupation of Kuwait (1 August 1990) for converting Kuwaiti dinars into United States dollars.

224. For claims stated in currencies other than Kuwaiti dinars or United States dollars, the currency exchange rate to be applied is the average rate in effect for the month of August 1990 for converting those currencies into United States dollars. 33/

B. Applicable dates for interest

225. In decision 16, the Governing Council specified that "Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award."

226. For category "D" loss types other than individual business losses, the "D1" Panel has decided that "the date the loss occurred" under Governing Council decision 16 is a single fixed date, being 2 August 1990 (the date of Iraq's invasion and occupation of Kuwait). 34/ The Panel adopts this finding for all category "D" individual business loss elements, with the exception of loss of business income, incremental costs and real property rental income claims.

227. Category "D" claims for loss of business income are for losses of income that would have been earned over a period of time. As such, an interest start date of 2 August 1990 for such losses would result in over-compensation for claimants. The Panel accordingly adopts the midpoint of the period for which loss of business income claims have been recommended for compensation as the date of loss for the purpose of calculating interest. 35/

228. Category "D" claims for incremental costs are for extraordinary business expenses that would not have been incurred if Iraq's invasion and occupation of Kuwait had not taken place. Examples of incremental costs claims are post-liberation financing, repair and clean-up costs, all of which would have been incurred post-liberation. The Panel recognises the difficulty of tracking different interest start dates for each incremental costs claim in category "D", given the large number of claims involved. After a review of the incremental costs claims in the sixth instalment, the Panel accordingly adopts a fixed date of 1 May 1991 as the date of loss for the purpose of calculating interest on incremental costs awards in category "D".

229. No individual business claims in the sixth instalment passed the legal tests for compensability for real property rental income. Accordingly, the Panel makes no finding with respect to the date of loss for the purpose of calculating interest for such claims.

C. Claim preparation costs

230. A number of category "D" individual business loss claimants have made claims for claim preparation costs incurred by them, either in amounts specified on the claim form or in more general terms.

231. The Panel has been informed by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs in the future. Accordingly, the Panel makes no recommendation with respect to compensation for claim preparation costs.

VII. RECOMMENDED AWARDS

232. A summary of the claimed amounts and the Panel's recommended compensation for each claim appears in Tables 2 and 3, below.

Geneva, 31 August 2000

(Signed) K. Hossain
Chairman

(Signed) N. Elaraby
Commissioner

(Signed) I. Suzuki
Commissioner

A. Recommended awards by submitting entity

Table 2. Summary of recommended awards by submitting entity

Submitting entity	Amount claimed (USD)	Number of claims recommended	Number of claims not recommended for payment	Amount of compensation (USD)	C deduction	Net compensation (USD)
Australia	203,416.00	-	1	0.00		0.00
Bahrain	1,725,535.00	2	2	44,330.00		44,330.00
Belgium	1,122,554.00	1	1	398,651.00	(44,916)	353,735.00
Canada	1,699,792.00	3	-	467,269.00		467,269.00
Cyprus	203,160.00	-	1	0.00		0.00
France	1,293,766.00	-	2	0.00		0.00
India	32,872.00	1	-	6,758.00		6,758.00
Israel	154,000.00	-	1	54,854.00	(54,854)	0.00
Jordan	23,392,715.00	31	3	8,472,879.00	(744,925)	7,727,954.00
Kuwait	46,131,770.00	92	6	25,719,758.00	(30,000)	25,689,758.00
Netherlands (the)	36,252,341.00	-	3	0.00		0.00
Pakistan	696,508.00	2	1	164,796.00	(23,166)	141,630.00
Saudi Arabia	7,250,821.00	1	1	46,126.00		46,126.00
Sudan	17,436.00	1	-	11,582.00		11,582.00
Syria	3,746,252.00	3	-	1,306,459.00		1,306,459.00
United Kingdom	9,021,666.00	3	1	1,123,223.00		1,123,223.00
United States	11,463,904.00	2	1	5,712,495.00		5,712,495.00
Yemen	2,210,513.00	5	-	841,164.00	(137,998)	703,166.00
UNDP (Washington)	313,785.00	1	-	202,287.00		202,287.00
Total	146,932,806.00	148	24	44,572,631.00	(1,035,859)	43,536,772.00

B. Recommended awards by D8/D9 loss element

Table 3. Summary of recommended awards by loss element

Level 2 loss element		Amount claimed (USD)	Number of claims recommended	Number of claims not recommended for payment	Amount of compensation (USD)
1	Real Property	3,065,734.00	9	1	1,323,221.00
2	Tangible Property	12,938,424.00	88	7	5,557,943.00
3	Stock	44,489,003.00	106	5	25,558,374.00
4	Livestock & Agricultural Products	1,650,740.00	5	-	524,934.00
5	Cash	298,721.00	5	1	58,323.00
6	Invalid Kuwaiti dinar	-	-	-	-
7	Bank Accounts and Securities	-	-	-	-
8	Vehicles	6,699,412.00	20	1	1,411,336.00
9	Business Income	53,669,603.00	102	17	8,227,879.00
10	Contracts	8,215,027.00	5	4	489,049.00
11	Receivables	5,734,660.00	9	13	123,407.00
12	Rent-a-Permit	158,477.00	2	-	58,581.00
13	Other	734,392.00	-	11	-
14	Goodwill	1,758,428.00	8	4	112,215.00
15	Key Money	1,748,315.00	14	-	694,589.00
16	Incremental Costs	4,071,821.00	14	6	483,280.00
17	Claim Prep. Costs	757,381.00	-	22	-
18	Interest	942,668.00	-	6	-
	Less: Compensation received from another source				(50,500.00)
	Total	146,932,806.00			44,572,631.00
	Less: C Deductions				(1,035,859.00)
	Net of C Deductions				43,536,772.00
	Net of Interest & Claim Prep. Costs	145,232,757.00			43,536,772.00

Notes

1/ A small number of claims in the sixth instalment included loss types other than individual business losses. This was as a result of the recategorisation of losses originally filed as individual business losses.

2/ The "E2" group of claims is defined as all claims filed in category "E" excluding those filed by Kuwaiti corporations, oil companies, construction/engineering companies and import/export companies; see S/AC.26/1998/7 at para. 3.

3/ One claimant advanced claims for two businesses on the same claim form, one a proprietorship and the other an incorporated business. The latter claim was severed from the former and deferred along with the other shareholder claims in the sixth instalment. The proprietorship was retained and valued in the sixth instalment.

4/ Some category "D" claims are for amounts less than USD 100,000. These claims have been properly filed in category "D" because they are for losses in excess of amounts claimed under claim forms B or C, or for losses relating to payments made or relief provided to others, pursuant to Governing Council decision 7 (S/AC.26/1991/7/Rev. 1).

5/ S/Res/687 (1991), para. 16.

6/ S/AC.26/1992/9.

7/ S/AC.26/1992/15, paras. 5 and 10.

8/ S/AC.26/1992/7, para. 6.

9/ S/AC.26/1992/15, para. 6.

10/ S/AC.26/1992/15, para. 9.

11/ Nationals of Organisation for Economic Co-operation and Development (OECD) countries include citizens of the following nations: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.

12/ S/AC.26/1999/6 at paras. 108-112.

13/ See the "Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Fourth Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" S/AC.26/2000/11 ("Part Two of the 'D1' Fourth Instalment Report").

14/ Part Two of the "D1" Fourth Instalment Report at para. 55.

15/ See paras. 45-50 of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Second Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" S/AC.26/1998/15 ("Part Two of the 'D1' Second Instalment Report").

16/ See Part Two of the "D1" Second Instalment Report at paras. 26-28 for the "D1" Panel approach.

17/ See the "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E4" Claims" S/AC.26/1999/4 at para. 133 (the "First Instalment 'E4' Report").

18/ See the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims) S/AC.26/1998/1 at para. 266 ("Part One of the 'D1' First Instalment Report").

19/ This is consistent with the practice of other Panels; see the First E4 Panel Report and Part One of the "D1" First Instalment Report.

20/ Part One of the "D1" Fourth Instalment Report, paras. 267-269.

21/ See para. 16 of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Fourth Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" S/AC.26/1999/21 ("Part 1 of the 'D1' Fourth Instalment Report").

22/ First Instalment "E4" Report, para. 178.

23/ First Instalment "E4" Report, paras. 182-187.

24/ See para. 77 of the "Report and Recommendations Made by the Panel of Commissioners Concerning the Third Instalment of 'E2' Claims" S/AC.26/1999/22.

25/ See the First Instalment "E4" Report, paras. 207-219.

26/ See, for example, the First Instalment "E4" Report, para. 207 ("Nine claimants in this instalment asserted claims for uncollectible receivables or "bad debts" aggregating over K.D. 3.9 million (approximately USD 13.5 million); S/AC.26/1999/17, para. 86 ("the Second Instalment 'E4' Report") (30 claimants asserting receivables claims aggregating USD 17,286.325); S/AC.26/1999/18, para. 78 ("the Fourth Instalment 'E4' Report") (33 claimants asserting receivables claims aggregating USD 18,564,827).

27/ See the First Instalment "E4" Report, para. 214.

28/ See generally, the "Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of "E2" Claims" S/AC.26/2000/2 ("the Fourth Instalment 'E2' Report").

29/ S/AC.26/1994/3 (the "First Instalment 'C' Report") and S/AC.26/1999/11 (the "Seventh Instalment 'C' Report").

30/ See the Seventh Instalment "C" Report, para. 331.

31/ See Part One of the "D1" Fourth Instalment Report, para. 21.

32/ See Part One of the "D1" First Instalment Report, paras. 61-63.

33/ The exchange rate used for currencies other than the United States dollar or Kuwaiti dinar is the average monthly rate for such currencies as reported in the United Nations Monthly Bulletin of Statistics, vol. XLV No. 4, April 1991 (ST/ESA/STAT/SER.1/220).

34/ See Part One of the D1 Fourth Instalment Report, paras. 64-65.

35/ This is consistent with the practice of other panels; see for example the First Instalment "E4" Report, para. 230.